

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CASTINA E. COOPER
Claimant

VS.

LIBERTY BANK & TRUST COMPANY
Respondent

AND

OLD REPUBLIC INSURANCE COMPANY
Insurance Carrier

Docket No. 1,055,441

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the January 18, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 18, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant was diagnosed with significant left carpal tunnel syndrome, a left trigger thumb, and right carpal tunnel syndrome. Claimant contends that her bilateral carpal tunnel syndrome and left trigger thumb condition are the result of engaging in repetitive work activities through April 26, 2010, while employed by respondent. At the preliminary hearing, claimant sought medical treatment for her right upper extremity.

Respondent admitted that claimant's left carpal tunnel syndrome and left trigger thumb were work related. However, respondent denied that claimant sustained right carpal tunnel syndrome by accident arising out of and in the course of her employment.

Respondent argues the medical evidence does not support claimant's allegation that her right carpal tunnel syndrome was caused by her work activities.

ALJ Hursh found that claimant's right carpal tunnel syndrome was an accidental injury that arose out of and in the course of her employment with respondent. He then ordered respondent to designate an authorized physician to evaluate claimant's right carpal tunnel syndrome symptoms and to provide treatment if necessary.

Respondent raises two issues on appeal:

1. Is claimant's right carpal tunnel syndrome an accidental injury that arose out of and in the course of her employment with respondent?
2. If so, is claimant's medical treatment warranted based on the medical evidence?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On April 15, 2011, claimant filed an Application for Hearing in which she alleged that as a result of "[r]epeated work activities" while working for respondent through April 26, 2010, she suffered "[i]njuries to bilateral upper extremities."¹

At the preliminary hearing, claimant testified she was 55 years of age and had been working for respondent for three years. Her current job title was Branch Operations Manager and she was responsible for overseeing three facilities. Claimant's job duties required her to use her hands a great deal, including inputting data on computers and counting coins and paper money. Counting coins required claimant to lift a bag full of coins off the machine and replace it with an empty bag. At the end of the day, she would take the filled bags of coins and get them ready for shipment to respondent's main vault.

At the beginning of 2010, claimant began experiencing numbness in her hands and pain in her arms. At the end of each workweek, claimant's hands and arms would be tired and sore. At some point claimant told her employer she was having problems with her left thumb and that she had made an appointment to see her doctor. Claimant testified that she strained her left thumb on April 26, 2010, when she lifted a bag containing money, including coins. Initially, claimant went to see Dr. Pratip B. Patel, her family physician, but the record does not indicate the date claimant saw Dr. Patel.

¹ Application for Hearing (filed April 15, 2011).

Dr. Patel referred claimant to Dr. John N. Vani, an orthopedic specialist. If Dr. Vani generated any reports, they were not placed into the record. Dr. Vani asked Dr. S. R. Reddy Katta to conduct electromyography (EMG) and nerve conduction studies of claimant's upper extremities. Dr. Katta saw claimant on June 24, 2010. His report indicates claimant, who is right-hand dominant, had pain in the left upper extremity into the shoulder, but denied any problems with her right upper extremity. Dr. Katta's report also stated claimant has diabetes mellitus and hypertension which she controls with medication. Dr. Katta was told by claimant that her work activities involved counting money, lifting bags of money and using a computer.

Dr. Katta physically examined claimant and also conducted EMG and nerve conduction studies of both upper extremities. The EMG and nerve conduction studies revealed claimant had carpal tunnel syndrome in both wrists, with the "... right being more involved than left side, but the patient is symptomatic only on the left side."² Dr. Katta indicated there was no evidence of left ulnar nerve compression neuropathy, generalized peripheral neuropathy or left cervical radiculopathy. His report also noted claimant clinically had tendinitis of her left thumb and left shoulder and degenerative joint disease of the left thumb metacarpophalangeal joint with some deformity of her left thumb. Dr. Katta's report does not give an opinion as to the cause of claimant's bilateral upper extremity medical problems.

Respondent then referred claimant to Dr. Steven B. Smith, an orthopedic specialist, who saw claimant on October 18, 2010. He reviewed claimant's prior medical records and the EMG and nerve conduction studies performed by Dr. Katta. Dr. Smith indicated that although claimant was right-hand dominant she was "... here primarily for left handed numbness and tingling and pain about her thumb."³ Claimant reported that she primarily used her left hand to count money and her symptoms had been going on for upwards of six months. Dr. Smith's report from that visit indicated claimant's right hand direct median nerve compression test was negative and an examination of her right thumb was within normal limits.

Dr. Smith concurred with the diagnosis that claimant had clinically significant left carpal tunnel syndrome and a high grade left trigger thumb. He opined that, "[b]ased upon her history and physical exam, I think it is medically more likely than not that the prevailing factor leading to these current conditions is her work related activities performed during the course of her banking activities involving primarily counting money using her left hand."⁴ He recommended that claimant undergo a left carpal tunnel release and left trigger thumb

² P.H. Trans., Cl. Ex. 2 at 2.

³ *Id.*, Resp. Ex. B at 1.

⁴ *Id.*

release, which were performed by Dr. Smith on December 14, 2010. Dr. Smith made no recommendations that claimant needed treatment for her right hand or wrist.

Claimant testified that Dr. Smith never examined her right hand. Claimant contends she told Drs. Vani and Smith that she had tingling and numbness in her right hand. However, claimant never discussed surgery on her right hand with Dr. Smith. She testified that she was having numbness and tingling in her right hand after her left carpal tunnel and left trigger thumb releases. Claimant indicated she did not have surgery on her right hand because it was not feasible for her to be off work as respondent was short-staffed. Claimant admitted that when she spoke to respondent's insurance adjustor in April 2010, she never told the adjustor about the right upper extremity symptoms.

At the preliminary hearing, the ALJ asked claimant several questions concerning her right upper extremity complaints. Claimant indicated that she was having symptoms in the right upper extremity while being treated for the left. Claimant had bilateral numbness and tingling, but only the left trigger thumb was causing her pain. At the preliminary hearing, claimant testified that she was still having tingling and numbness in her right hand.

On November 14, 2011, Dr. Patel recommended that claimant have her right wrist evaluated.⁵ Claimant's attorney had claimant obtain a note from Dr. Patel referring claimant to Dr. Smith for her right wrist.⁶ That note is the only medical report of Dr. Patel that was made part of the record.

Claimant's attorney apparently contacted Dr. Smith about claimant's right upper extremity problems. In a letter dated November 17, 2011, to claimant's counsel, Dr. Smith wrote:

The question arises whether or not Ms. Cooper is requiring right carpal tunnel release at this time for her work-related activities. I have reviewed her neurodiagnostic tests that were performed previously. They did show some significant swelling of her median sensory and distal motor latencies. However, the last time that I evaluated her right hand, her physical findings were not clinically significant nor was she complaining substantially of her right hand.

Therefore, based on the information that I have currently, I would say she is not in need of right carpal tunnel surgery for right carpal tunnel syndrome.

⁵ *Id.*, Cl. Ex. 1.

⁶ *Id.*, at 26.

Certainly, if her clinical symptoms have changed since the last time I formally examined her right hand, which would have been on or about 10/18/2010, I would certainly be happy to see her back and reevaluate her for this condition.⁷

ALJ Hursh found claimant's right carpal tunnel syndrome arose out of and in the course of her employment with respondent and ordered respondent to provide claimant with a treating physician. ALJ Hursh stated in his Order:

Dr. Smith opined the claimant's left carpal tunnel and trigger thumb were related to her job duties. Right median nerve entrapment was identified on the right at the same time it was identified on the left. It stands to reason Dr. Smith's causation opinion would apply equally to the right. The doctor gave no indication he felt the right carpal tunnel was not work related when asked to comment on the right side in November, 2011.⁸

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.⁹

Claimant testified that she was experiencing tingling and numbness in her right hand at the same time she was having problems with her left hand and thumb. She alleges she reported her right hand problems to Drs. Vani and Smith. According to his records in the record, Dr. Smith examined claimant's right hand on or about October 18, 2010. The neurodiagnostic tests conducted by Dr. Katta revealed claimant had bilateral carpal tunnel syndrome. It would be somewhat unusual for Dr. Katta to conduct an EMG and nerve conduction studies on both of claimant's upper extremities had she only complained to

⁷ *Id.*, Resp. Ex. A.

⁸ ALJ Order (Jan. 18, 2012) at 2.

⁹ *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

Drs. Patel and Vani of problems with her left upper extremity. It is not unusual for a patient to concentrate on the medical condition that is causing them the most problems. Claimant testified that both her right and left hands had numbness and tingling, but it was only her left that was painful.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,¹⁰ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."¹¹

Here, the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove her right carpal tunnel syndrome was work related. Accordingly, this Board Member concludes claimant proved by a preponderance of the evidence that she suffered right carpal tunnel syndrome by accident arising out of and in the course of employment with respondent.

The Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 44-534a and amendments thereto or the ALJ must have exceeded his jurisdiction as required by K.S.A. 2011 Supp. 44-551. Neither K.S.A. 2011 Supp. 44-551 nor K.S.A. 44-534a and amendments thereto confers jurisdiction upon the Board to determine whether medical treatment is warranted based upon the medical evidence presented. Accordingly, respondent's application for Board review on this issue is dismissed.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

¹⁰ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

¹¹ *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

¹² K.S.A. 2011 Supp. 44-534a.

¹³ K.S.A. 2011 Supp. 44-555c(k).

CONCLUSION

1. Claimant met her burden of proof that she developed right carpal tunnel syndrome by accident arising out of and in the course of her employment with respondent.

2. The Board is without jurisdiction to determine if claimant's medical treatment is warranted based on the medical evidence and, therefore, dismisses respondent's appeal of that issue.

WHEREFORE, the undersigned Board Member affirms the January 18, 2012, preliminary hearing Order entered by ALJ Hursh.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge